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NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

SECOND APPELLATE DISTRICT

DIVISION SEVEN

THE PEOPLE, Plaintiff and Respondent, v. GARRETT TAYLOR ADAMS, Defendant and Appellant.	B284753 (Los Angeles County Super. Ct. No. MA064049)

APPEAL from a judgment of the Superior Court of Los Angeles County, Frank M. Tavelman, Judge. Reversed.

Law Office of Elizabeth K. Horowitz and Elizabeth K. Horowitz for Defendant and Appellant.

Xavier Becerra, Attorney General, Gerald A. Engler, Chief Assistant Attorney General, Lance E. Winters, Senior Assistant Attorney General, Paul M. Roadarmel, Jr. and Stephanie A. Miyoshi, Deputy Attorneys General for Plaintiff and Respondent.

INTRODUCTION

Garrett Taylor Adams (Adams) appeals from the judgment entered after a jury acquitted him of first degree premeditated murder but convicted him of first degree mayhem felony murder and found he personally used a deadly or dangerous weapon. Adams argues, among other things, that substantial evidence did not support the jury's finding he specifically intended to commit mayhem and that the trial court's instruction on mayhem felony murder was erroneous. We conclude that there was substantial evidence Adams specifically intended to commit mayhem, but that the trial court prejudicially erred when it instructed the jury on the specific intent element of mayhem felony murder. Therefore, we reverse.

FACTUAL AND PROCEDURAL BACKGROUND

A. *Adams Shoots Briggs with a Compound Bow and Kills Him*

Adams was an experienced, licensed hunter. He had not purchased meat in a store in over seven years. He hunted deer and other game with a rifle and with a compound bow, which is a bow that uses a wheel and pulley system that allows it to be drawn and held at different "draw weights." Adams knew never to point a weapon at anything he did not intend to shoot.

One evening Adams was drinking alcohol with his girlfriend, Bernadette Marquez, at their home in Lancaster. Adams got into a physical altercation with Marquez and went to a local bar. When he returned at 3:00 a.m., he fought again with Marquez.

Adams's twin brother, Cameron Adams (Cameron), and Cameron's friend, Charles Briggs, arrived and got into an argument with Adams. All three men were drunk. The physical altercation between Adams and Marquez evolved into a fight among Adams, Cameron, and Briggs. The three men wrestled and threw punches at each other, and there was "a lot of yelling." The fight eventually stopped, and Adams went inside the house, leaving Cameron and Briggs in the driveway. Cameron and Briggs argued and shoved each other.

Adams emerged from the house some minutes later with his compound bow and several razor-tip hunting arrows. Adams stood still for a moment before Briggs noticed him with the bow. Briggs said, "What, are you going to shoot me?" Adams told Briggs, "You'd better leave, or I'll shoot you." Briggs, who was angry and yelling, dared Adams to shoot him. He said, "What do you think? I'm scared to die? Shoot it. Just let it go." Adams, who was "very, very angry" and "puffing his chest," walked toward Briggs as Briggs backed away. The distance between Adams and Briggs decreased to several feet and then increased to 20 feet. Adams told his brother to move because he was blocking Adams's shot. Briggs raised his arms away from his body at the elbows and turned his palms up. Adams raised the bow, drew it, aimed at Briggs, and without hesitating fired an arrow.

Briggs hunched over and stepped back saying, "Oh, my God, why'd you do that?" Adams said, "I shot that nigger," "That's what you get, homie," and "I should shoot you with my gun, homie, you better run." (Investigating officers subsequently found a rifle and a loaded magazine in Adams's house.) Adams

also stated, "When I tell you I'm going to shoot you, you better run."[1]

The arrow entered Briggs's right upper chest, traveled downward, and protruded out his back. The arrow pierced Briggs's diaphragm, lacerated his liver and pancreas, and ruptured his spleen. Briggs walked down the street before collapsing. A registered nurse happened to see Briggs fall and rendered aid until paramedics arrived. Briggs died during emergency surgery.

B. *Adams Makes Up a Story About What Happened*

After Adams shot Briggs, he handed the bow to Marquez and told her to put it "somewhere" and call 911. Adams went to a neighbor's house, pounded on the door, said "that nigger got in my house," and asked the neighbor to call the police. Adams told Marquez to "stick to the story and say that someone broke in our house and he had shot [him]."

In a telephone call made and recorded while Adams was in custody, Adams asked an unidentified listener to tell Marquez "to keep her mouth shut . . . cause that's crucial for me." He added, "Make sure . . . when you see her, tell her make sure she's not out there flapping her lips about this shit . . . ."

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[1] The jury saw original and enhanced video recordings of the incident. Streetlights illuminated the scene. The video showed Adams firing the arrow toward Briggs and captured the sound (but not the sight) of the arrow hitting Briggs.

C. *The People's Archery Expert Testifies the Shooting Was Not an Accident*

The prosecution's archery expert, Deputy Thomas Marquez, testified Adams's compound bow was for hunting large game such as deer, black bear, elk, and, at close range, moose. The bow was equipped to use razor-tip hunting arrows that measured more than an inch in diameter. The arrows were designed to create a large wound that would cause an animal to bleed out quickly, with the goal of killing the animal "quickly and humanely." The deputy test-fired Adams's bow and concluded it was fairly accurate. In Deputy Marquez's opinion, Adams had fully drawn the bow before he fired the arrow at Briggs. Deputy Marquez viewed a video of the shooting and concluded it was not an accident.

D. *The Jury Convicts Adams*

The jury acquitted Adams of first degree premeditated murder, but convicted him of first degree mayhem felony murder (Pen. Code, §§ 187, subd. (a), 189).[2] The jury also found Adams personally used a deadly or dangerous weapon (§ 12022, subd. (b)(1)). The trial court sentenced Adams to a prison term of 25 years to life for first degree mayhem felony murder plus one year for the deadly or dangerous weapon enhancement.

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[2] Statutory references are to the Penal Code.

DISCUSSION

A. *Substantial Evidence Supported Adams's Conviction for Mayhem Felony Murder*

Adams argues substantial evidence did not support the jury's finding he specifically intended to maim Briggs, as required for mayhem felony murder. We address this issue first because, even if one of Adams's other arguments has merit, we would still need to decide whether substantial evidence supported his conviction. (See *People v. Morgan* (2007) 42 Cal.4th 593, 613 ["[a]lthough we have concluded that the . . . conviction must be reversed . . . we must nonetheless assess the sufficiency of the evidence to determine whether defendant may again be tried for the . . . offense"]; *People v. Hill* (1998) 17 Cal.4th 800, 848 [reviewing court must address whether substantial evidence supported the defendant's conviction, even where other errors require reversal, because "double jeopardy would prevent" the defendant's retrial]; *People v. Garcia* (2012) 204 Cal.App.4th 542, 553 ["[w]e address defendant's sufficiency of the evidence argument due to its double jeopardy implications"].) We conclude there was substantial evidence from which the jury could reasonably find Adams had the requisite specific intent.

1. *Standard of Review*

"We discern sufficiency by inquiring whether evidence was presented from which a reasonable trier of fact could conclude, beyond a reasonable doubt, that the prosecution sustained its burden of proof. [Citation.] Although we assess whether the evidence is inherently credible and of solid value, we must also view the evidence in the light most favorable to the jury verdict

and presume the existence of every fact that the jury could reasonably have deduced from that evidence." (*People v. Mora and Rangel* (2018) 5 Cal.5th 442, 488; accord, *People v. Mendez* (2019) 7 Cal.5th 680, 702.) "'A reversal for insufficient evidence "is unwarranted unless it appears 'that upon no hypothesis whatever is there sufficient substantial evidence to support'" the jury's verdict.'" (*People v. Manibusan* (2013) 58 Cal.4th 40, 87 (*Manibusan*); accord, *People v. Penunuri* (2018) 5 Cal.5th 126, 142.)

"'[E]vidence of a defendant's state of mind is almost inevitably circumstantial, but circumstantial evidence is as sufficient as direct evidence to support a conviction.' [Citations.] Moreover, the standard of review that applies to insufficient evidence claims involving circumstantial evidence is the same as the standard of review that applies to claims involving direct evidence. 'We "must accept logical inferences that the jury might have drawn from the circumstantial evidence. [Citation.]" [Citation.] "Although it is the jury's duty to acquit a defendant if it finds the circumstantial evidence susceptible of two reasonable interpretations, one of which suggests guilt and the other innocence, it is the jury, not the appellate court that must be convinced of the defendant's guilt beyond a reasonable doubt. [Citation.]" [Citation.] Where the circumstances reasonably justify the trier of fact's findings, a reviewing court's conclusion the circumstances might also reasonably be reconciled with a contrary finding does not warrant the judgment's reversal.'" (*Manibusan*, *supra*, 58 Cal.4th at p. 87.)

2. *To Commit Mayhem Felony Murder, the Defendant Must Have the Specific Intent To Commit Mayhem*

Section 189, subdivision (a), provides, in relevant part, "All murder . . . that is committed in the perpetration of, or attempt to perpetrate," various enumerated felonies, including mayhem, is "murder in the first degree." Section 203 defines mayhem: "Every person who unlawfully and maliciously deprives a human being of a member of his body, or disables, disfigures, or renders it useless, or cuts or disables the tongue, or puts out an eye, or slits the nose, ear, or lip, is guilty of mayhem." Mayhem is a general intent crime. (*People v. Quarles* (2018) 25 Cal.App.5th 631, 636; *People v. Rodarte* (2014) 223 Cal.App.4th 1158, 1169; *People v. Park* (2003) 112 Cal.App.4th 61, 64.) Felony murder based on mayhem, however, like aggravated mayhem, is a specific intent crime (§ 205; *Manibusan*, *supra*, 58 Cal.4th at p. 86; *People v. Szadziewicz* (2008) 161 Cal.App.4th 823, 831, disapproved on another ground in *People v. Dalton* (2019) 7 Cal.5th 166, 214), and the People must prove the defendant had the specific intent to maim. (*People v. Gonzales* (2011) 51 Cal.4th 894, 939; cf. *People v. Anderson* (1965) 63 Cal.2d 351, 359 ["'In the absence of . . . a showing of specific intent to commit mayhem, the court should not give the jury an instruction on felony murder mayhem.'"].)

"[S]pecific intent to maim may not be inferred solely from evidence that the injury inflicted actually constitutes mayhem; instead there must be other facts and circumstances which support an inference of intent to maim . . . ." (*People v. Ferrell* (1990) 218 Cal.App.3d 828, 835.) "'A jury may infer a defendant's specific intent from the circumstances attending the act, the

manner in which it is done, and the means used, among other factors.' [Citation.] '[E]vidence of a "controlled and directed" attack or an attack of "focused or limited scope" may provide substantial evidence of' a specific intent to maim." (*People v. Szadziewicz*, *supra*, 161 Cal.App.4th at p. 831.) But "where the evidence shows no more than an 'indiscriminate' or 'random' attack, or an 'explosion of violence' upon the victim, it is insufficient to prove a specific intent to maim." (*People v. Quintero* (2006) 135 Cal.App.4th 1152, 1162; see *People v. Anderson*, *supra*, 63 Cal.2d at p. 359.)

3. *There Was Substantial Evidence Adams Specifically Intended To Maim Briggs*

The leading case on the sufficiency of the evidence of specific intent to commit mayhem, *Manibusan*, *supra*, 58 Cal.4th 40, involved aggravated mayhem (on an aiding and abetting theory), not mayhem felony murder. In *Manibusan* the defendant, who was the driver of the car, and a confederate were looking for someone to rob. They saw two women, Aninger and Mathews, carrying purses. The confederate stuck his head out of the car window and said, "Give me your money," but the women did not respond. The confederate turned back into the car and said, "[T]hese bitches are being assholes. They didn't hear me." He turned back toward the women, pointed his gun at them, and started firing, hitting Mathews multiple times and Aninger twice, once in the head and once in the upper arm. Mathews died; Aninger survived but suffered brain damage. (*Id*. at p. 48.) As the defendant drove away, the confederate stated, "We couldn't leave witnesses," and the defendant laughed in response. The two men also congratulated themselves on the shooting. (*Id.* at

p. 89.)

The Supreme Court acknowledged that on these facts "a juror perhaps could have concluded from the evidence that the Aninger shooting was only 'a sudden and indiscriminate attack' prompted by 'frustration' about the 'ineffectual' robbery attempt. But, for several reasons, a juror also could have reasonably concluded otherwise. First, upon getting no response to his demand for money, [the confederate], whose head and hand were already hanging out of the car, did not simply react and immediately begin firing. Instead, he first turned back into the car, toward its other occupants, so he could comment on what had transpired. Only after making his comment did he turn back toward the women, stick his hand out of the window, point his gun and start firing. Second, contrary to defendant's claim, there was evidence from which a juror could have reasonably concluded that [the confederate] 'direct[ed] fire toward a specific body part.' [The confederate] shot Aninger from very close range—only five to 10 feet—hitting her once in the face—her forehead—and once in the upper arm, near her face. This evidence, viewed in the light most favorable to the prosecution, reasonably supports the inference that [the confederate] did not, as defendant asserts, fire indiscriminately, but focused his attack on Aninger's head, which is a particularly vulnerable part of the body." (*Manibusan*, *supra*, 58 Cal.4th at p. 88.)

The Supreme Court also stated, "In prior decisions, we have held that the fact the victim was shot in the head can support an inference of an intent to kill. [Citations.] We now find that the same fact can support an inference of an intent to cause permanent disability or disfigurement. 'It takes no special expertise to know that [several shots fired at someone's head]

from close range, if not fatal, [are] highly likely to disable permanently.'" (*Manibusan*, *supra*, 58 Cal.4th at p. 88.) The Supreme Court emphasized that "'a defendant may intend both to kill his or her victim and to disable or disfigure that individual if the attempt to kill is unsuccessful'" and that evidence sufficient to establish a defendant's intent to kill the victim may also be "'sufficient to establish the intent to permanently disable or disfigure that victim.'" (*Id.* at p. 89, fn. omitted.)

Two other aggravated mayhem cases illustrate the kind of evidence sufficient to show intent to disable or disfigure. In *People v. Park*, *supra*, 112 Cal.App.4th 61 the court found "multiple factors which, when taken together, constitute substantial evidence defendant entertained the specific intent to maim [the victim]." (*Park*, at p. 69.) "For one thing, defendant's mode of attack demonstrates this was not an indiscriminate attack. He attacked using [a] steel knife sharpener in a throwing motion by bringing the weapon from behind his head and over his shoulder. This action gave his blows more force and therefore gave him a greater ability to inflict serious injury than if he had simply held the sharpener in front of him and tried to jab or stab [the victim]. Significantly, defendant aimed at an extremely vulnerable portion of [the victim's] body: his head. . . . Defendant's limiting the scope of his attack to [the victim's] head shows this was not an indiscriminate attack but instead was an attack guided by the specific intent of inflicting serious injury upon [the victim's] head." (*Ibid.*)

The court in *Park* also stated: "Another factor that shows defendant's specific intent is that he planned his attack on [the victim] following a demonstrated antagonism between the two groups. The first manifestation of animosity was when

defendant's group began the 'out-staring fight' with [the victim's] party in the restaurant. Tension escalated when [the victim's] group made a verbal threat as they left the restaurant. At that point, defendant, although very angry, had the presence of mind to walk to the back of the restaurant, locate and take the knife sharpener, leave the restaurant, find [the victim's] group, and confront them. After asking a hostile question and stating his association with [a gang], defendant, without any verbal or physical provocation, attacked [the victim] with the knife sharpener. Taken together these circumstances show defendant's attack was the product of deliberation and planning, not an explosion of indiscriminate violence. This, in turn, is further evidence that in attacking [the victim] with the knife sharpener, defendant had the intent to maim." (*People v. Park*, *supra*, 112 Cal.App.4th at pp. 69-70.)

In *People v. Ferrell, supra,* 218 Cal.App.3d 828 a "friend from jail sent" the defendant to the victim's apartment. (*Id.* at p. 831.) The defendant shot the victim in the neck from two feet away. The bullet severed the victim's spine and resulted in severe paralysis. The court in *Ferrell* held that there was substantial evidence the defendant intended to kill the victim or to disable her permanently and that the defendant could have both intents simultaneously. The court concluded "this bizarre shooting was a cold and deliberate attack. [The defendant] . . . shot [the victim] once in the neck, from short range. Once [the victim] was down, [the defendant] did not fire additional shots at her, to make certain that she was dead; instead, [the defendant] was apparently satisfied with the result of her single shot. It takes no special expertise to know that a shot in the neck from close range, if not fatal, is highly likely to disable permanently.

[The defendant's] shooting of [the victim] was not an indiscriminate, random attack on her body; instead, the shooting was directed and controlled. From all this evidence, the jury could reasonably have inferred that [the defendant] intended both to kill [the victim], and, if she did not die, to disable her permanently." (*Id.* at pp. 835-836; see *People v. Santana* (2013) 56 Cal.4th 999, 1012 [evidence the defendant "stood at close range and fired three shots with a . . . revolver into the [victim's] leg and buttock area" while the victim "lay unresisting on the ground" "strongly support[ed] a finding that [the] defendant intended to inflict a disabling injury"].)

Under *Manibusan*, *Park*, and *Ferrell* the evidence here was sufficient to support the jury's finding Adams had the specific intent to commit mayhem. Adams did not explode in anger and attack Briggs indiscriminately. The altercation Adams describes as a drunken brawl had ended. Although he may have still been angry, Adams had the presence of mind to walk into his house and retrieve his hunting bow (and not his loaded gun). The bow was equipped with a razor-tip arrow Adams, an experienced hunter, knew would create a large wound that, if not fatal, would disable or disfigure Briggs. Adams aimed at Briggs's chest, "an extremely vulnerable area of the body." (*People v. Moore* (2002) 96 Cal.App.4th 1105, 1114; see *People v. Dick* (1968) 260 Cal.App.2d 369, 371 [the stomach is a "highly vulnerable" area].) He shot Briggs at the relatively close range of 20 feet, limited his attack to one shot, and, apparently satisfied with its result, left Briggs with an arrow sticking out of his back. As Briggs retreated down the street, Adams told him to run or he would shoot him with his gun. The jury could reasonably conclude from this evidence that Adams's attack was not an indiscriminate

explosion of violence but a planned and focused attack on a particularly vulnerable part of Briggs's body with a weapon that would cause a large wound and that Adams stopped his attack once he maimed Briggs.

Adams argues the "jury's acquittal of first degree murder on the basis of premeditation and deliberateness supports" his position that the "shooting in the current case was an 'unplanned and reactive attack' following a drunken fight, as opposed to a 'deliberate and planned shooting' with a specific purpose." Just because the People failed to prove Adams premeditated and deliberated, however, does not mean the attack was sudden and indiscriminate. An attack can be "controlled and directed" (*People v. Szadziewicz*, *supra*, 161 Cal.App.4th at p. 831; *People v. Ferrell*, *supra*, 218 Cal.App.3d at p. 835) without being the product of advance thought and consideration (*People v. Ghobrial* (2018) 5 Cal.5th 250, 278; *People v. Brooks* (2017) 3 Cal.5th 1, 58) or a """careful weighing of considerations""" (*People v. Pearson* (2013) 56 Cal.4th 393, 443). And substantial evidence supported the jury's finding Adams's attack was controlled and directed.

4. *Adams's Attempts To Distinguish Manibusan Are Not Persuasive*

Adams attempts to distinguish *Manibusan* and *Ferrell* because the victims in those cases, unlike Briggs, survived with disabling injuries. As Justice Werdegar pointed out in her dissenting opinion in *Manibusan*, aggravated mayhem requires a specific intent to inflict a grievous injury but "allow the victim to live." (*Manibusan*, *supra*, 58 Cal.4th at p. 104 (dis. opn. of Werderdar, J.), italics omitted.) Justice Werdergar also stated, in words anticipating facts similar to this case, "If, as the majority

reasons, the same fact that can support an intent to kill—i.e., that the victim was shot in the head—'can support an inference of an intent to cause permanent disability or disfigurement' [citation], many cases of attempted murder will, as a logical matter, also involve aggravated mayhem . . . . " (*Id.* at p. 106.)

Justice Werdegar, however, joined only by Justice Liu, wrote the dissenting opinion on this point in *Manibusan*, not the majority opinion. As stated, the majority in *Manibusan* held otherwise, concluding a defendant may have concurrent intents to murder and to maim. (*Manibusan*, *supra*, 58 Cal.4th at p. 89; see *People v. D'Arcy* (2010) 48 Cal.4th 257, 297 [there was evidence the defendant "had concurrent intents to maim and murder"]; *People v. Ferrell*, *supra*, 218 Cal.App.3d at pp. 833-834 [a defendant may intend to both kill and to maim].) The majority in *Manibusan* disagreed with Justice Werdegar's view "that, except in rare and exceptional cases, an intent to kill and an intent to cause permanent disability are mutually exclusive, such that evidence sufficient to show the former necessarily precludes a finding of the latter." (*Manibusan*, at p. 89, fn. 10.)

Adams asks us to follow *People v. Sears* (1965) 62 Cal.2d 737, overruled on another ground in *People v. Cahill* (1993) 5 Cal.4th 478, 509, fn.17, and *People v. Anderson*, *supra*, 63 Cal.2d 351, which he asserts are "highly analogous" to this case, and to conclude *Manibusan* was "wrongly decided." They are not, and we cannot. In *Anderson* the defendant inflicted over 60 wounds "ranging over [the victim's] entire body from the head to the extremities" after she refused his sexual advances. (*Anderson*, at pp. 356-357.) In *Sears* the primary victim's daughter entered the living room while the defendant was attacking her mother. The defendant struggled with the daughter, who died "as a result of a

knife wound which punctured her jugular vein. She also suffered a scalp wound and several lacerations to her face." (*Sears*, *supra*, 62 Cal.2d at p. 741.) In both cases the Supreme Court held that the defendant committed an indiscriminate attack and that there was insufficient evidence to support a mayhem felony murder instruction. (*Anderson*, at pp. 358-359; *Sears*, at pp. 744-745.) As discussed, Adams's attack on Briggs was not indiscriminate. He withdrew from the three-way altercation with Briggs and Cameron, left the scene to get his compound bow, took an arrow and nocked it, and calmly shot Briggs in the chest. And even if we believed *Manibusan* was wrongly decided, we would still have to follow it. (See *Tanguilig v. Bloomingdale's, Inc.* (2016) 5 Cal.App.5th 665, 673 ["as an inferior state court, we are bound to follow the California Supreme Court's holding"]; *Rose v. Hudson* (2007) 153 Cal.App.4th 641, 652 [to the extent the appellant was arguing a Supreme Court decision "was wrongly decided, the argument fails, as we are bound to follow the precedent of the California Supreme Court"].)

Adams also argues that, as a policy matter, the Supreme Court's decision in *Manibusan* will have undesirable effects on California law governing homicide. He argues that under *Manibusan* "virtually any time a person shoots someone with a firearm it would be sufficient to show an intent to commit mayhem, as both [a gun and a compound bow] send forth projectiles that are intended to rip through a body and cause massive internal injury." Adams also asserts "it cannot be overlooked that regardless of how similar the intent requirements are for aggravated mayhem and mayhem underlying a felony murder charge, *Ferrell* and *Manibusan* were not murder cases. This means those courts were not taking into

consideration the danger that finding sufficient evidence of intent to maim under the circumstances presented could automatically turn every death caused by a deadly weapon aimed at a particular part of the body into a first degree felony murder."

Adams's policy arguments may have some merit. Under *Manibusan* the People may be able to charge many shootings as mayhem felony murders. But the Legislature included mayhem in section 189, subdivision (a), as a basis for first degree felony murder, and the Supreme Court in *Manibusan* held that a shooter can intend both to kill and to maim. And it may be that, because *Manibusan* was not a felony murder case, the Supreme Court did not consider the implication of its decision on mayhem felony murder cases. But those are issues for the Supreme Court. And the potential merit of Adams's policy arguments does not make *Manibusan* any less binding on us.

B. *The Trial Court Prejudicially Erred in Instructing the Jury on the Requisite Specific Intent To Commit Mayhem Felony Murder*

1. *The Jury Instructions Were Erroneous*

In criminal cases, the trial court has a sua sponte duty to instruct the jury on general principles of law relevant to the issues (*People v. Whalen* (2013) 56 Cal.4th 1, 68; *People v. Avila* (2009) 46 Cal.4th 680, 704), including all the elements of a charged offense (*People v. Rivera* (2019) 7 Cal.5th 306, 332; *People v. Merritt* (2017) 2 Cal.5th 819, 824). We review arguments of instructional error de novo. (*People v. Mitchell* (2019) 7 Cal.5th 561, 579; *People v. Hamilton* (2009) 45 Cal.4th 863, 948.)

Here, the trial court erred in failing to instruct the jury it had to find Adams acted with the specific intent to inflict a disabling or disfiguring injury on Briggs. The trial court instructed the jury pursuant to CALCRIM No. 252 that, to find Adams guilty of willful, deliberate, and premeditated murder or murder resulting from mayhem, "the person must not only intentionally commit the prohibited act, but must do so with a specific intent." The court further instructed the jury "the act and the specific intent required are explained in the instruction for that crime."

But in the instruction for the crime of mayhem felony murder, the court gave a modified version of CALCRIM No. 540A, adding the italicized language:

"The defendant is charged in count one with murder under a theory of felony murder.

"To prove that the defendant is guilty of first degree murder under this theory, the People must prove that:

"One, the defendant committed mayhem;

"*1A, to prove the defendant committed mayhem, the People must prove that the defendant caused serious bodily injury when he unlawfully and maliciously permanently disfigured somebody;*

"Two, the defendant intended to commit mayhem; and

"And three, while committing mayhem, the defendant caused the death of another person.

"*Someone acts maliciously when he or she intentionally does a wrongful act or when he or she acts with an unlawful intent to annoy or injure somebody.*"

The trial court never instructed the jury that the People had to prove the defendant had the specific intent to disable or disfigure the victim. The court stated the People had to prove the

defendant intended to commit mayhem, but defined mayhem as causing serious bodily injury that causes permanent disfigurement. Thus, under the court's instructions, the jury could have convicted Adams of mayhem felony murder by finding he intended to inflict serious bodily injury without finding he intended to inflict a disfiguring or disabling injury.[3]

There is a pattern instruction for aggravated mayhem, CALCRIM No. 800, which includes the statement that the People must prove that, "when the defendant acted, (he/she) intended to (permanently disable or disfigure the other person/ [or] deprive the other person of a limb, organ, or part of (his/her) body." The trial court, however, did not give that instruction. Nor did the court instruct the jury the defendant had to have the specific intent to commit the underlying felony. (Cf. *People v. Friend* (2009) 47 Cal.4th 1, 49 [trial court properly instructed the jury in a robbery felony murder case that "'[t]he unlawful killing of a human being . . . which occurs as a result of the commission of or an attempt to commit the crime of robbery, and where there was in the mind of the perpetrator the specific intent to commit such crime, is murder of the first degree"']; *People v. Osband* (1996) 13 Cal.4th 622, 685 ["[t]he jury was [properly] instructed with regard to felony murder: 'The unlawful killing of a human being . . . which occurs as a result of the commission or attempt to

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[3] The court's instruction was based on an incorrect version of CALCRIM No. 801 for simple mayhem. (See *People v. Santana*, *supra*, 56 Cal.4th at pp. 1007-1010.) "[T]he 'serious bodily injury' language first appeared in CALCRIM No. 801 (mayhem) in August 2006." (*Id.* at p. 1007.) The Judicial Council removed this language from the instruction in February 2014 (1 Witkin & Epstein, Cal. Criminal Law (4th ed. 2019), Crimes Against the Person, § 84), three years before the trial in this case.

commit . . . rape . . . and where there was in the mind of the perpetrator the *specific intent* to commit such crime, is murder of the first degree'"]; *People v. Northrop* (1982) 132 Cal.App.3d 1027, 1037 [trial court "correctly informed the jury that the requisite intent under the felony-murder theory is the specific intent to commit the underlying felony" and that the "defendant can only be convicted of felony murder if under circumstances or conditions likely to produce great bodily harm or death, the defendant had the *specific intent* to and did [commit child abuse'"].)

2. *The Error Was Prejudicial*

"An instructional error that improperly describes or omits an element of the crime from the jury's consideration is subject to the 'harmless error' standard of review set forth in" *Chapman v. California* (1967) 386 U.S. 18, 24, and we "consider whether it appears beyond a reasonable doubt that the instructional error did not contribute to the jury's verdict." (*People v. Lamas* (2007) 42 Cal.4th 516, 526; see *People v. Marsh* (2019) 37 Cal.App.5th 474, 490 [where an instruction improperly defines an element of a charged offense, the "instructional error must result in reversal unless it appears beyond a reasonable doubt that the error did not contribute to the verdict"].) For an instructional error to be harmless under *Chapman*, the evidence must be "'of such compelling force as to show beyond a reasonable doubt' that the erroneous instruction 'must have made no difference in reaching the verdict obtained.'" (*People v. Harris* (1994) 9 Cal.4th 407, 431.)

The instructional error was not harmless beyond a reasonable doubt here. The parties vigorously disputed Adams's

intent, and the evidence supporting the jury's finding Adams specifically intended to disable or disfigure Briggs, while substantial, was not overwhelming. Whether Adams, when he fired the razor-tip arrow at Briggs, intended to maim Briggs, rather than or in addition to killing him, was a close call. And under the trial court's instructions, the jury reasonably could have found Adams intended to cause Briggs serious bodily injury without finding Adams specifically intended to disable or disfigure him. As Adams puts it: "Because this entire case revolved around the type of intent [Adams] harbored, the jurors needed a precise instruction concerning that intent." Instead of a precise instruction, the jurors got an erroneous one. On this record, we cannot say "it is clear beyond a reasonable doubt that a rational jury would have rendered the same verdict absent the error." (*People v. Merritt*, *supra*, 2 Cal.5th at p. 831.)

DISPOSITION

The judgment is reversed.

SEGAL, J.

We concur:

PERLUSS, P. J. FEUER, J.